

New Probate Rule 24

Balancing Efficiency
and Due Process

BY MICHAEL HOLDER



This article reviews the development of Colorado Rule of Probate Procedure 24.

The Uniform Probate Code was initially proposed to address concerns that under prior law, probate of decedents' estates was too slow and costly, and there was little need for formal judicial review and management of what amounted to a predominantly administrative task. The complexity of the somewhat antiquated prior probate law, which could thwart the decedents' intent to provide for their dependents, and the delay and expense of petitioning the court for allowances for survivors' needs were seen as significant impediments to probate administration.

In response, alternative methods to probate became popular, such as the use of joint tenancy and trusts. These alternatives were encouraged by books such as *How to Avoid Probate*.¹ While vilified by attorneys and others who viewed this book's author as practicing law without a license,² the book's popularity exemplified the public's dissatisfaction with then existing probate procedures.

This article takes a brief look at how the Colorado Uniform Probate Code and non-appearance hearings evolved to address these concerns.

The Colorado Uniform Probate Code

The Colorado Uniform Probate Code³ was adopted in response to the dissatisfaction with the prior probate code. Its underlying purposes include clarifying and simplifying the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons; discovering and making effective the decedent's intent in his or her property distribution; and promoting a speedy and efficient system for liquidating decedents' estates, making distributions to successors, and managing and protecting the estates of protected persons.⁴

The method chosen by the drafters of the Uniform Probate Code, which was adopted in Colorado in 1973,⁵ was to minimize judicial intervention and make probate proceedings more administrative in nature.⁶ Thus, today a personal representative may be granted the authority to deal with the assets of a decedent through issuance of Letters by the Registrar, without the need for review by a judge or magistrate.⁷ "Interested persons"⁸ are given the initial responsibility for protecting their own interests, and they may request appropriate court action to control or remedy the actions of fiduciaries.⁹

While there are specific instances when the Uniform Probate Code and the mandates of procedural due process¹⁰ require notice and an opportunity to be heard,¹¹ sometimes procedural due process may be provided without the need for a hearing in open court with some or all of the interested persons physically present. For example, there is no constitutional infirmity in a trial court acting on a motion without oral argument, even if it is a dispositive motion, such as a motion for summary judgment.¹² This was recognized in the promulgation of former Colorado Rule of Probate Procedure (CRPP) 8.8, which provided for "Non-Appearance Hearings."

Non-Appearance Hearings

CRPP 8.8 was aimed at routine matters. In practice, the rule was somewhat confusing and practitioners occasionally improperly invoked it. The rule required that nonappearance hearings could be used only for matters that were "routine and . . . expected to be unopposed,"¹³ and provided for notice to be given to interested persons establishing a time limit in which to object. However, the rule also provided that once an objection was interposed, the objector's failure to set the matter for an appearance hearing within a specified period of time would necessarily result in dismissal of the objection with prejudice and without further hearing.¹⁴ Although not provided for under a strict reading of the rule, the mandatory dismissal of the objection with prejudice led to a belief that if an objection were interposed and the matter was not set for an appearance hearing within the requisite time period, the requested relief *must* be granted. From there it was not a far leap to the belief that if no objection were interposed to the relief requested and set for an appearance hearing, the relief *must* be granted, even though the former rule stated that if no objection were filed, the court could take action on the motion or petition without further notice or hearing.¹⁵

On September 1, 2018, former Rule 8.8 was replaced with CRPP 24, which makes it clear that the court retains, in all instances, the power consistent with its obligation to provide for ultimate justice. Rule 24 continues to provide for filing a request for a judicial determination and notice of a time period in which objections must be filed, but does away with the former Rule 8.8 requirement that failure to timely set an appearance hearing requires dismissal of the objection.

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Rule 24 specifically lists actions the court may take, including requiring an appearance hearing. That list is not exhaustive, but provides a wide range of alternatives, from summarily granting or denying the relief requested to requiring evidence or argument, and even compelling alternative dispute resolution where appropriate. (See Appendix for the full rule.) The rule’s Official Comments state that “the rule is useful for matters required by statute to have a hearing when a party appearance is not required or mandated.”¹⁶ If no objection is filed, the court may take action on the matter without further notice or hearing,¹⁷ or upon the filing of an objection, the court may in its discretion

- rule on the written filings and briefs submitted;
- require oral argument;
- require an evidentiary hearing;
- order the petitioner, movant, objector, and any other interested person who has entered an appearance to participate in alternative dispute resolution; or
- enter any other orders the court deems appropriate.¹⁸

Thus, the court can expeditiously address and resolve many of the day-to-day matters with which it is presented. The Official Comments acknowledge that there has been some confusion among practitioners and self-represented

parties regarding when the court was required to rule on a matter scheduled under former Rule 8.8, and they point out that Rule 24 does not require that the court rule on a motion on the date scheduled for hearing without an appearance. The Comments clarify that the court may rule on these matters in due course after the date specified for the hearing without appearance has passed by stating, “[t]he rule allows for expediting many matters before the probate court while specifying that matters may be determined by the probate court without an appearance hearing, such as accommodating a real estate closing or other deadline such as a move-in date for a party.”¹⁹

Rule 24 was drafted to complement CRCP 121 § 1-15, which governs motion practice in litigation, by addressing the more administrative context of probate proceedings. Rather than providing that the rule is only to be used for matters that are “routine and are expected to be unopposed,” Rule 24 states that unless otherwise prohibited, any *appropriate* matter may be set for a hearing without appearance. While what may or may not be “appropriate” is not set out in the rule, it is clearly not for use in contested dispositive matters such as motions to dismiss or motions for summary judgment, and such motions should be filed using the procedure set forth in CRCP 121 § 1-15.²⁰

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At the same time, there is a continuing obligation to consult with other “parties” before filing a motion.²¹ How the requirement to confer with these parties will play out in conjunction with Rule 24 has yet to be seen. It seems that if, after consultation, a party or “interested person” indicates opposition to the motion or request, the provisions of this rule may still be

appropriate, as it gives notice of the time within which an objection should be filed. Because in probate matters interested persons and parties who are not represented by counsel are frequently present, the additional notice of when a response is due can furnish clarity and constitutional safeguards for participants while providing for judicial economy and timely decision making. Ultimately, however, the determination of which matters are appropriate for treatment under Rule 24 will rest with the probate court.

Conclusion

New CRPP 24 is designed to provide procedural due process where the Colorado Uniform Probate Code provides that the court may take action after “notice and hearing,” while at the same time providing the court with an efficient procedure to help manage the demands on its time and resources. The ability to request a court

order for appropriate matters, with a minimal expenditure of resources, conforms with the underlying purpose of the Colorado Uniform Probate Code to permit limited involvement by the court. Rule 24 should improve the management of decedents’ estates. ^{CL}

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NOTES

1. Dacey, *How to Avoid Probate* (Crown Publishers, Inc. 1965).
2. See, e.g., Hoepfner and Dacey, “How to Avoid Probate,” 1 *Val. U. L. Rev.* 197 (1966); Obituary of Norman Dacey, *The New York Times* (Mar. 19, 1994).
3. CRS §§ 15-10-101 et seq.
4. CRS § 15-10-102.
5. CRS § 153-1-101 (1973).
6. CRS § 15-10-102.
7. CRS § 15-12-303.
8. CRS § 15-10-201(27).
9. See the Official Comment to § 3-603 of the Official Text and Comments Approved by the National Conference of Commissioners on Uniform State Laws (1969, last amended or revised in 2010), enacted in Colorado as CRS § 15-12-603, without comment (“[T]he court and registrar are not responsible for seeing that personal representatives perform as they are supposed to perform. Rather, performance is coerced by the remedies available to interested persons. Interested persons are protected by their ability to demand prior notice of informal proceedings [citation omitted], to contest a requested appointment by use of a formal testacy proceeding or by use of a formal proceeding seeking the appointment of another person.”). See also CRS § 15-10-501.
10. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Tulsa Prof'l. Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *In re Estate of Ongaro*, 998 P.2d 1097 (Colo. 2000).
11. These are CRS § 15-11-211, proceedings for elective-share; CRS § 15-12-401, formal testacy

- proceedings; CRS § 15-12-402, formal testacy or appointment proceedings; CRS § 15-12-614, special administrator appointments; CRS § 15-12-1001, formal proceedings terminating administration and orders of general protection; CRS § 15-12-1002, formal proceedings terminating testate administration, orders construing wills without adjudicating testacy; CRS § 15-12-1302, petitions to determine heirship; CRS § 15-12-1303, hearings, notice, service; CRS § 15-14-107, transfer of jurisdiction; CRS § 15-14-110, letters of office; CRS § 15-14-205, procedure for judicial appointment of guardians; CRS § 15-14-312, emergency guardians; CRS § 15-14-315.5, dissolution of marriage and legal separation; CRS § 15-14-401, protective proceedings; CRS § 15-14-414, petitions for orders subsequent to appointment; CRS § 15-14-420, reports and court access to records; CRS § 15-14-425.5, authority to petition for dissolution of marriage or legal separation; and CRS § 15-14.5-301, transfer of guardianship or conservatorship to another state.
12. See CRCP 121 § 1-15 ¶ 4.
 13. Former CRPP 8.8 (a).
 14. Former CRPP 8.8 (a)(5).
 15. Former CRPP 8.8 (a)(3).
 16. CRPP 24, cmt. 1.
 17. CRPP 24(c)(3).
 18. CRPP 24(d).
 19. CRPP 24, cmt. 3.
 20. CRPP Rule 24, cmt. 2.
 21. CRCP 121 § 1-15 ¶ 8.

RULE 24. DETERMINATION OF MATTERS BY HEARING WITHOUT APPEARANCE

(a) A hearing without appearance is a setting before or with the court for a ruling without the appearance of the parties.

(b) Unless otherwise required by statute, these rules, or court order, any appropriate matter may be set for a hearing without appearance.

(c) The procedure governing a hearing without appearance is as follows:

(1) Attendance at the hearing without appearance is not required or expected.

(2) Any interested person wishing to object to the requested action set forth in the court filing attached to the notice must file a specific written objection with the court at or before the hearing, and must serve a copy of the objection on the person requesting the court order and all persons listed on the notice of hearing without appearance. Form JDF 722, or a form that substantially conforms to JDF 722, may be used and will be sufficient.

(3) If no objection is filed, the court may take action on the matter without further notice or hearing.

(4) If any objection is filed, the objecting party must, within 14 days after filing the objection, contact the court to set the objection for an appearance hearing. If a hearing is scheduled, the objecting party must file a notice of hearing, and serve a copy on all persons listed on the notice of hearing without appearance. Failure to timely set the objection for an appearance hearing as required will result in action by the court as set forth in subsection (d).

(d) Upon the filing of an objection, the court may, in its discretion:

(1) Rule upon the written filings and briefs submitted;

(2) Require oral argument;

(3) Require an evidentiary hearing;

(4) Order the petitioner, movant, objector, and any other interested person who has entered an appearance to participate in alternative dispute resolution; or

(5) Enter any other orders the court deems appropriate.

(e) The Notice of a Hearing Without Appearance, together with copies of the court filing and proposed order must be served on all interested persons no less than 14 days prior to the setting of the hearing and must include a clear statement of this rule governing a hearing without appearance. Form JDF 712 or JDF 963, or a form that substantially conforms to such forms, may be used and will be sufficient.

COMMENTS

2018

[1] Before the 2018 amendments, the rule was titled “Non-Appearance Hearings,” which engendered confusion for practitioners and self-represented parties as it referred to a hearing, which denotes an appearance, and then directed the party not to appear before the court. As a part of the 2018 amendments, the title of the rule changed to “Determination of Matters by Hearing Without Appearance” that more appropriately describes the actual practice; the rule is useful for matters required by statute to have a hearing when a party appearance is not required or mandated.

[2] The pre-2018 rule directed that matters which are “routine and unopposed” may be scheduled for hearing without appearance, however, there was no definition contained within the rule for what matters are considered to be “routine and unopposed.” With the 2018 amendments, language defining a hearing without appearance was added in subsection (a), and language generally describing what may be set on the docket in subsection (b).

Motions for summary judgment and motions to dismiss are not appropriate for placement on a docket for hearing without appearance, and these motions should be filed using the procedure set forth in C.R.C.P. 121 § 1-15.

[3] The rule does not contain a requirement that the court rule on a motion on the date scheduled for hearing without an appearance. There is confusion among practitioners and self-represented parties regarding when the court is required to rule on a matter scheduled under this rule; the court may rule on these matters in due course after the date for hearing without appearance has passed. This rule allows for expediting many matters before the probate court while specifying that matters may be determined by the probate court without an appearance hearing, such as accommodating a real estate closing or other deadline such as a move-in date for a party.

[4] Matters denoted as requiring immediate action should not be scheduled for hearing without appearance.

[5] Concerns were raised regarding the shortened time frame in subsection (c) (4) for ruling on motions contained within the rule and whether the failure of a party or counsel to respond within these time frames would unfairly prejudice a party. Practitioners should bear in mind their ethical obligations to opposing parties and counsel when choosing to schedule a motion that may be opposed on the docket for hearing without appearance. Scheduling a motion on the docket for hearing without an appearance for determination on the merits where no responsive pleading has been filed with the court increases judicial economy by placing an opposing party or counsel on notice that a ruling may be entered unless a responsive pleading is filed with the court.